82-5317

No. 82-

IN THE

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SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL GENE BERRYHILL,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019
(212) 586-8397

ATTORNEY FOR PETITIONER

QUESTION PRESENTED

Whether stricter procedural and substantive standards should be applied by trial courts in determing whether to grant a change of venue motion upon the retrial of a capital case?

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Petitioner Michael Gene Berryhill respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia, which has not yet been reported, is annexed hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was rendered on May 18, 1982. A timely petition for rehearing was denied on June 2, 1982. On July 20, 1982, the Honorable Lewis F. Powell granted a timely motion to extend the time to file this petition from August 1, 1982 to and including August 31, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant

part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

George C. Hooks, Jr. was a prominent businessman and civic leader in the south central Georgia town of Cartersville, Georgia. His murder in 1974 received extensive publicity in the Cartersville and Bartow County press. The eventual arrest of a suspect and later developments in the case were given wide publicity. The Bartow County Herald Tribune of November 27, 1974, for example, included a front page, headline article announcing the arrest of Michael Gene Berryhill and another article listing the members of the traverse jury who would try him for murder. Widespread publicity attended petitioner's Bartow County trial, including detailed accounts of the facts alleged by the State as well as the testimony of most witnesses. On January 9, 1975, petitioner was convicted of felony murder and armed robbery. The following day he was sentenced to die by electrocution. The Supreme Court of Georgia affirmed. Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975) and this Court subsequently denied a petition for certiorari. Berryhill v. Georgia, 429 U.S. 1054 (1977).

After an unsuccessful attempt to obtain state habeas corpus relief, see Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978), the United States District Court for the Northern District of Georgia granted petitioner habeas corpus relief on May 13, 1980, reversing his convictions and sentence.

Petitioner was subsequently re-indicted in Bartow County for the same offense. In June of 1981, jury selection began for his retrial. Petitioner filed a timely motion seeking a change of venue from the small rural county in which he had previously been tried, convicted, and sentenced to death. The trial judge chose to delay a ruling on the motion until after the voir dire was complete. Petitioner sought to strengthen his change-of-venue motion by the introduction into evidence of a public opinion poll. Petitioner produced as witnesses the experts who conducted the poll, and filed a memorandum in support of his motion. The trial judge refused to allow the poll as evidence bearing upon the change of venue issue. Petitioner also filed a motion for an individual sequestered voir dire. The trial court permitted individual voir dire but refused to permit sequestration.

An examination of the voir dire reveals that of the 102 prospective jurors called, 59 veniremen were individually examined. Although the first trial had occurred six years before the retrial, 78 percent of those individually examined remembered reading or hearing the facts of the case, including the previous verdict. Moreover, 42 percent said they had heard friends or neighbors express opinions that the petitioner was guilty. Forty-two percent also stated or implied that they too felt petitioner was guilty. Some jurors were quite frank about their bias:

> "Q. Do you have an opinion here today as to which side shall win this case based on what you have heard up until now? When I say "which side" I mean either the State or the Defendant?
>
> Mr. Curtis: Well, if he did it the State will win.
>
> Q. All right, but do you have an opinion yet as to whether or not the Defendant is guilty or whether or not he did it?
>
> Mr. Curtis: He must have did it. If he didn't he wouldn't be in here."
>
> (Trial Transcript, 295-96)

An exchange with another prospective venireman was similar:

"Q. All right, based on what you and I have just talked about rather generally as far as conversation of people which involves discussing the facts, discussing opinions, guilt or innocence and what punishment is appropriate, based on all three of those things do you think you have found an opinion in your mind as to whether or not he is innocent or guilty?

Mr. Dye: I did at the beginning.

Q. Do you still have that opinion in your mind?

Mr. Dye: I will have that opinion until the defense proves otherwise."

A third exchange exemplifies the attitudes of many prospective jurors:

"Q. Have you had consultations with your friends and family about the case?

Mr. Herrin: Yeah, it has been discussed.

Q. All right, has it been constantly or fairly well spread out since the original incident or was it at one particular time?

Mr. Herrin: I think it was, more or less, when it first happened and then when the situation came up where they were going to have to have a new trial here there was some discussion about it then.

Q. Talk flared up on it again?

Mr. Herrin: Uh-huh [yes].

Q. Now in these conversations that you have had with people, have people expressed their opinions to you as to his guilt or innocence?

Mr. Herrin: Yes.

Q. And what were those opinions?

Mr. Herrin: Guilty.

Q. Any opinion been expressed to you as to what punishment he should get?

Mr. Herrin: Yes.

Q. What were those opinions?

Mr. Herrin: The electric chair.

Q. Now based on your hearing all these opinions have you formed an opinion in this case as to guilt or innocence?

Mr. Herrin: No sir. You know, I'm like Mr. Summey. I think when the first trial, there was something to it that he was convicted, and then due to some legal technicality, as I understand it, is the reason we are up here again."

(Trial Transcript, 210-11)[1/]

The voir dire resulted in the selection of a jury of twelve, eleven of whom knew the facts of the case and three of whom had an opinion as to petitioner's guilt. Following their selection, petitioner renewed his motion for a change of venue. The motion was denied and the trial began fifteen minutes later (Trial Transcript, at 818).

Following the trial, the jury rejected petitioner's defense of insanity and found him guilty of armed robbery and murder. During its deliberations at the sentencing phase, the jury returned to the courtroom three times for additional information indicating that they were deadlocked. After 27 hours, a verdict was rendered sentencing petitioner to death by electrocution (Trial Transcript, 1, 506).

1/ While the two former veniremen were excused for prejudice, the latter was not, the trial judge having accepted the jurors' declaration of impartiality. The court's refusal to strike such jurors was not rare. Although 42 percent of the veniremen stated or implied an opinion as to the petitioner's guilt, only 8 percent were excused because of prejudicial opinions as to guilt.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Prior to his retrial, petitioner filed a "Motion for Change of Venue." The trial judge delayed a ruling until after voir dire. On June 3, 1981, after the selection of the jury, petitioner argued to the trial court that this motion should be granted, since prejudicial pre-trial publicity had endangered his constitutional right to a fair trial by an impartial jury (Trial Transcript, 812-814). Petitioner was allowed to place into the record several newspaper articles about the petitioner's trial history. These articles were introduced in order to show community prejudice. Petitioner also introduced a set of statistics summarizing the results of the voir dire in an effort to show the actual prejudice of the veniremen and jurors. The trial judge denied the motion for change of venue, because he felt the news articles alone were insufficient evidence of community prejudice, and because most veniremen with opinions as to petitioner's guilt said that they could lay their opinions aside. As discussed above, the trial judge refused to consider a public opinion poll in his deliberations on the venue motion.

On appeal, petitioner alleged in his Enumeration D that "the trial court erred in refusing to grant appellant's motion for change of venue." Petitioner argued that the circumstances of this case were inherently prejudicial to his Sixth Amendment right to an impartial jury. (Appellant's Brief, at 13)

The Georgia Supreme Court disagreed, holding that "a motion for change of venue lies within the sound discretion of the trial judge" and that no abuse of discretion existed in this case. (Berryhill v. State, A., at 6)

2. On May 29, 1981, petitioner moved for an opportunity to introduce the results of a public opinion poll, conducted by the University of Georgia School of Journalism in support of his change of venue motion. The motion was denied and the poll excluded even though expert pollsters indicated that the poll was statistically reliable and consistent with professional ethics and practices. (Transcript of Hearings of May 25, 1982, at 23-41, and May 29, 1982, 5-43) Petitioner contended that the poll demonstrated the high level of community prejudice against him and therefore should have been admitted into evidence at the venue hearing. Since the judge did not allow authentication or admittance of the poll, he failed, in effect, to protect the petitioner's right to due process and his right to trial by an impartial jury.(Transcript of Hearings,May 29,1982 at 2)

On appeal, petitioner argued in enumeration D, that the public opinion poll would have verified the prejudicial effects of the extensive media publicity. He also contended that "the Court had an affirmative duty to consider all circumstances that might impede the ability to obtain an impartial jury, that the Court failed to adequately consider the totality of the circumstances, and that such failure is reversible error." (Appellant's Brief, at 17)

The Supreme Court of Georgia was unpersuaded stating that "even if the opinion poll had been tendered in evidence, the appellant would not have met his burden as to change of venue." Berryhill v. State, A., at 8. The Court also noted that petitioner's witnesses initially refused to testify because they did not want to disclose the confidential names of the polled subjects. Berryhill v. State, A., at 5. (Petitioner notes that the witnesses eventually did appear and agree to provide the court with all the information requested.(May 29, 1981 Hearing, at 58)).

REASON FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER MORE CAREFUL STANDARDS SHOULD BE APPLIED BY LOWER COURTS IN RESOLVING CHANGE-OF-VENUE MOTIONS UPON THE RETRIAL OF A CAPITAL CASE

A. In Light Of The Risk Of Substantial Prejudice, More Careful Standards Should Govern Change-Of-Venue Requests In Capital Cases

This Court has long recognized that excessive pretrial publicity can have a prejudicial effect upon jurors in a criminal trial. See, e.g., Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966). The Court in each of these prior opinions has cautioned that pretrial accounts of a case can create a wave of public passion inherently prejudicial to a defendant. However, in Murphy v. Florida, 421 U.S. 794 (1975) this Court held that in order for a petitioner to show that he was deprived of a fair trial by an impartial jury, he must ordinarily "show that the setting of the trial was inherently prejudicial or that the jury selection process of which he complains permits an inference of actual prejudice." 421 U.S. at 803. Murphy has led many judges to conclude that prejudicial conditions do not exist unless news publicity has been wildly inflammatory; and thus factual news articles have not been perceived as increasing the level of public passion. See, e.g., Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (Ga. 1974), State v. Sunday, 609 P.2d 1188 (Mont. 1980), State v. Sonnier, 379 So.2d 1336 (La. 1979), Commonwealth v. Rolison, 374 A.2d 509 (Pa. 1977). Under Murphy, some trial courts have disregarded the fact that even factual information can nurture a subtle, yet pervasive community prejudice which deprives a

defendant of his Sixth and Fourteenth Amendment rights.

This problem is particularly acute in the retrial of capital cases, where a community may well have been exposed not only to the facts of the case, but also to a jury's judgment on the appropriate sentence to be employed. The knowledge that a jury had previously sentenced the same person to death will lead some veniremen to form a strong opinion as to the appropriate punishment which the community should impose:

> "With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception . . . from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Irvin v. Dowd, supra, 366 U.S. at 727.

Thus when a capital juror is asked on retrial whether he or she can lay aside their opinions and render a verdict based on the evidence, as the law requires, an affirmative response is not necessarily true. As the Court stated about similar jurors in Irvin v. Dowd, supra, 366 U.S. at 728,

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

This Court has previously insisted that trial courts ensure that a defendant not be unfairly disadvantaged by community prejudice:

> "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighted against the accused." Sheppard v. Maxwell, supra, 384 U.S. at 362 (emphasis supplied).

On the retrial of a capital case, a stricter standard is required to ensure that prejudicial attitudes will not deny the accused a fair trial by a impartial jury or deprive him of his life without due process of law. See generally, Gardner v. Florida, 430 U.S. 349 (1977); Beck v. Alabama, 447 U.S. 625 (1980). Petitioner submits that when prospective jurors state

that they have opinions as to a defendant's guilt, have knowledge of the prior sentencing verdict in the case, or have knowledge of a community presumption of the appropriate sentence, community prejudice should be presumed. Similarly, where a public opinion poll or other social science evidence indicates such community attitudes, prejudice should be presumed.

B. If A Showing Of Actual Prejudice Is Required To Obtain A Change Of Venue In The Retrial Of A Capital Case, Then Trial Courts Should Admit Scientifically Reliable Public Opinion Polls Into Evidence

Currently, no uniform judicial standards govern the circumstances in which public opinion polls should be admitted in criminal proceedings. 76 ALR 2d 632 §11.

However, where a defendant is being retried for a capital offense, reliable, scientifically gathered information about community prejudice is highly relevant to whether venue should be changed. To ignore reliable social science evidence that community prejudice exists is equivalent to an abandonment of the judicial duty to protect a defendant's right to due process of law and a fair trial by an impartial jury. As Justice Black has stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."
> Re Murchison, 349 U.S. 133, 136 (1955) (emphasis supplied).

Thus, if the Court were to hold that defendants, in the retrial of capital cases, must show actual prejudice before a change of venue is required, then trial courts should be required to admit statistically reliable public opinion polls into evidence at change of venue hearings.

CONCLUSION

The writ of certiorari should be granted.

Dated: August 27, 1982

Respectfully submitted,

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

ATTORNEY FOR PETITIONER

Prepared with the assistance of:

DONALD TYLER
Harvard Law School
Cambridge, Massachusetts